(4) (5)

Nos. 98-791 & 98-796

IN THE SUPREME COURT OF THE UNITED STATES

J. DANIEL KIMEL, JR., *et al.*
Petitioners

v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF ENGLISH LANGUAGE ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

BARNABY W. ZALL
Counsel of Record for Petitioners
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943

July 9, 1999

5pp

QUESTION PRESENTED

Whether the Eleventh Amendment bars a private suit in federal court against a State for violation of the Age Discrimination in Employment Act or the Americans with Disabilities Act.

INTEREST OF AMICUS CURIAE

English Language Advocates ("ELA")[1] is a non-profit advocacy organization dedicated to the preservation and promotion of a common language – English – in American political and governmental life. ELA is an unincorporated project of U.S., Inc., of Petoskey, Michigan, a non-profit charitable and educational corporation. ELA and its President, Robert D. Park, have been the principal advocates for "official English" policies before the federal courts, including in Nos. 95-974, *Arizonans for Official English and Robert D. Park v. Arizona* ("*AOE I*") and 98-167 ("*AOE II*"). Counsel for all parties have consented to the filing of this brief.

ELA's interest in this case stems from its concerns over challenges to policies of the twenty-five States which have declared English their official languages. Currently, for example, the Eleventh Circuit is considering *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998)(federal regulations preclude Alabama's use of English-language drivers license exam), which involves Eleventh Amendment issues which might be affected by a decision in this case.

Amicus ELA takes no position on the Age Discrimination in Employment Act or Americans with Disabilities Act questions in this case, but writes solely to suggest to the Court that any relief not impinge on

---

[1] Pursuant to Rule 37.6, *amicus* ELA certifies that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that counsel for *amicus* wrote this brief without assistance from any other counsel.

other rights of the States protected by the Tenth Amendment (including a State's right to choose its own language for internal operations).

SUMMARY OF ARGUMENT

A State's choice of which language to use in internal operations is a historically-based, protected "core function." Any federal abrogation of a language choice should be explicit and limited to remedial exercises of power. The decision in this case should not suggest otherwise.

ARGUMENT

There are several areas of State sovereignty beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, No. 98-436 (June 23, 1999), Slip Op. 42-43.

This is not a new thought, as this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other Justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

Under this Court's recent decisions, the Tenth Amendment protects the reservation of "original powers" of a State. *U.S. Term Limits v. Thornton*, 514

U.S. 779, 801 (1995); *Alden*, 29, *quoting, Nevada v. Hall*, 440 U.S. 410, 425 (1979).

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, this Court has permitted States to use various languages. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869)(Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned."). And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence, 1763-1815*, 18 (1972).

Like the choice of location of its own State Capitol, the choice of language a State uses in conducting its affairs is a "function essential to [the State's] separate and independent existence." *Coyle v. Wyoming*, 221 U.S. 559, 595 (1911). Choice of language for internal State operations is thus an "original power," core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531 (June 23, 1999), Slip Op. 11. There are few, if any, such abrogations. Yet at least one case suggests federal **regulations implicitly** require a State to provide services in languages other than English: *Sandoval v.*

Hagan, 7 F.Supp.2d 1234 (M.D. Alabama 1998)(striking English-language drivers license examinations as violating federal regulations), *on appeal*, No. 98-6598 (11^{th} Cir., argued March 25, 1999).

A decision in this case which sweeps too broadly may inadvertently affect the lower courts' review of these language questions. For example, overly-broad language about congressional power to remedy unlawful discrimination might be misinterpreted as congressional authority to dilute States' immunity over its core language functions.

Any decision in this case, therefore, should not sweep so broadly as to suggest that Congress has exercised or delegated a power to abrogate States' Tenth Amendment rights to control the language of their own internal operations.

CONCLUSION

Amicus ELA, therefore, respectfully urges the Court not to expand federal power in a fashion which might affect *Sandoval* or other cases.

BARNABY W. ZALL
Counsel of Record for Amicus Curiae
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943

July 9, 1999